IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2006 Session

LORITA BRACKETT v. STEVE BRACKETT

Appeal from the Circuit Court for Monroe County
No. V-02-089P Lawrence H. Puckett, Judge

No. E2005-00345-COA-R3-CV - FILED APRIL 20, 2006

This is a divorce case. The trial court granted Lorita Brackett ("Wife") a divorce from Steve Brackett ("Husband"), set aside to the parties their respective separate property interests, divided the net marital estate, and awarded attorney's fees to Wife. Husband appeals, claiming that the trial court erred in its classification and division of the marital residential property. Husband also challenges the propriety of the court's award of attorney's fees to Wife. The trial court's award of fees is reversed. The court's judgment regarding the division of the net marital estate is modified, and, as such, is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed in Part; Affirmed in Part, as Modified; Case Remanded with Instructions

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

J. Reed Dixon, Sweetwater, Tennessee, for the appellant, Steve Brackett.

Randy G. Rogers, Athens, Tennessee, for the appellee, Lorita Brackett.

OPINION

I.

The facts are these. Wife was married once before. She and her first husband were divorced approximately two years before she met Husband in 1982. As a result of that divorce, each of the parties was left with a one-half interest in a piece of property in Monroe County known as Cold Stream Farm. That property, which served as the residence for the first marriage, consists of a house located on 12 acres. As a part of their divorce settlement, Wife and her first husband agreed that each would be left with a half interest in the property, that the property would be sold, and that the proceeds would be split equally. Wife and her son from the previous marriage continued to live on

the property after her first divorce. The property was not sold because, as Wife testified, "there never was a buyer."

Prior to the marriage in the instant case, Husband and Wife decided to purchase the former husband's interest in Cold Stream Farm; they intended to use the property as their marital residence. On June 19, 1982 – before their marriage in July, 1982 – Wife's former husband executed a warranty deed conveying his half interest in the property to Husband in the latter's sole name. The record before us reflects that both Husband and Wife contributed separate property toward the purchase of the interest of Wife's former spouse. Husband paid $10,000 in cash, while Wife contributed $5,000. Wife's contribution came from the proceeds of the sale of her car. Using Husband's other separate real property as collateral, the parties secured a loan for $30,000 and applied the proceeds toward the purchase of the former husband's one-half interest. Wife testified that in further consideration for the transfer to Husband, she agreed with her former husband to reduce her child support entitlement. Her former husband, under the parties' divorce judgment, had been obligated to pay $100 a month until the property was sold, after which he was to pay $200 a month. In negotiating the purchase of the former husband's interest, Wife agreed to keep the payments at $100 a month, even though, as far as the former husband was concerned, the property had been sold in the sense that he had been fully compensated for his half interest.

After Husband and Wife were married in July, 1982, they exchanged quit-claim deeds, the result of which was to place the Cold Stream Farm property in the names of the parties as tenants by the entirety. The parties acquired various other tracts of real property and other property during the course of their marriage. Notably, some of their newly acquired real property was obtained using the Cold Stream Farm property as collateral.

In March, 2002, after almost 20 years of marriage, Wife filed this divorce action. Thereafter, the parties attempted to mediate their differences. The record contains a letter from the parties' Rule 31 mediator addressed to counsel for the parties, indicating that the parties, in mediation, had agreed on certain specified matters. Among the items agreed to was the parties' consent that "[t]here shall be a 50/50 division of all assets and liabilities." The letter also noted that "[a]ll issues regarding separate versus marital property and alimony shall be reserved" for a later date. It is clear from the tenor of the letter that the agreement with respect to the "50/50 division" only pertains to the *marital* assets and debts.

The trial court held a hearing on September 7, 2004, at which time it addressed the classification and division of the net marital estate. The court's subsequent judgment granted the parties a divorce and, without referring to the mediation agreement by name, divided the parties' property. The entire value of the Cold Stream Farm property was awarded to Wife. In its opinion rendered from the bench, the court made the following pertinent statements with respect to its decision regarding the Cold Stream Farm property:

> The parties had some estate at the beginning of this marriage, which I think is very significant, especially in light of the fact that the house

> that she later jointly owned with him through deed, half of that was from a prior marriage. And here's what – I've been up here thinking, well, are you saying 50/50 and include as a marital property the entire value of the house that she had a half interest in before they ever got together? Well, I'm not going to do that. Whatever we do here, she has not truly separate property as a half interest in the home at Cold Stream Farm. I can't say legally it's separate [property]. I can say equitably it's going to not be treated for purposes of the 50/50 division as anything other than an equitable interest for her, in her favor.
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> * * *
>
> I've already told you that I feel like that [Wife] has at least an equitable interest in $152,300 worth of this home at Cold Stream Farm, and that's equitable. That's not legally separate, but it's equitably separate in the Court's mind and will not be divided further by any – it won't be included [in] a calculation that goes 50/50 from there on, but everything else will be 50/50.
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> * * *
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> I'm not considering [the $152,300 interest] as separate. I'm not pulling it out as separate. I'm treating it equitably as separate. I'm treating it as part of the marital estate.
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> * * *
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> I'm going to let her have the house, and that gives her – I'm not counting her separate, so I am giving her credit for $152,300, all right, so she gets that in her column. The total value of that house and 12 acres is $304,600, so over on her side is $152,300. The rest of that $152,300, as I've said, I'm treating as what she equitably ought to not have divided with him because he didn't do anything to contribute to her having that half of interest in that property, in my view, at least not enough to consider it.

The trial court went on to divide the rest of the marital estate "as close as possible to a 50% or equal division." The net effect of the trial court's judgment with respect to the marital assets and debts is reflected below:

Assets/Debts	Wife	Husband	Total Value
Cold Stream Farm	$304,600		$ 304,600
Acreage adjacent to Cold Stream Farm	85,000	85,000	170,000
Office Building		180,000	180,000
Glenn Drive Property	62,000		62,000
Old Athens Rd. Property		27,545	27,545
Highway 68 Property	162,500	162,500	325,000
Debt on Highway 68 Property[1]	<136,823>	<136,824>	<273,647>
Improvements to Husband's Separate Property		5,500	5,500
Personal Property	28,916	29,895	58,811
Accounts Receivable	82,921	82,921	165,842
	$589,114	$436,537	$1,025,651

Husband was also ordered to pay Wife "as alimony in solido, the sum of $5,000.00 toward reimbursement of her attorney's fees." Husband appeals the trial court's judgment with respect to (1) the classification and division of the marital residential property and (2) the award of attorney's fees.

II.

Because this is a non-jury case, our review is *de novo* upon the record of the proceedings below with a presumption of correctness as to the trial court's factual findings, a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). We review the trial court's conclusions of law *de novo* with no such presumption of correctness. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993).

[1] At the time of the judgment of divorce, the parties had $273,647 in marital debt. The court addressed the debt as follows:

> [P]ursuant to the parties' announcement that they had received an offer to purchase one tract of real estate owned by the parties and located on New Highway 68, . . . for the sum of Three Hundred Twenty-Five Thousand ($325,000.00) Dollars and it is the Court's Order that the parties accept said offer and sell said property for the offered amount and that the proceeds from the sale of said property should be used to retire all of the debt owed by the parties . . ., and then the parties shall divide equally any outstanding proceeds from said sale.

We have accounted for this debt by subtracting one-half of it from each party's column.

III.

Husband's issues on appeal raise the following questions for our review:

> 1. Does the evidence preponderate against the trial court's classification and division of the Cold Stream Farm property?
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> 2. Did the trial court abuse its discretion in awarding Wife $5,000 in attorney's fees?

We will address each in turn.

IV.

Husband's first issue is whether the trial court correctly classified the Cold Stream Farm property. In divorce cases, Tennessee recognizes two distinct classes of property: "marital property," as defined in Tenn. Code Ann. § 36-4-121(b)(1) (2005), and "separate property," as defined in Tenn. Code Ann. § 36-4-121(b)(2) (2005). The distinction is important because, in an action for divorce, only marital property is to be equitably divided between the parties. *See* Tenn. Code Ann. § 36-4-121(a)(1) (2005). Generally speaking, property that is acquired during the marriage by either or both spouses and still owned by either or both spouses at the time of the divorce is classified as marital property and is thus subject to equitable division. *See* Tenn. Code Ann. § 36-4-121(b)(1). However, in general terms, property interests acquired by a spouse before marriage, and property acquired by a spouse during the marriage by way of gift, bequest, devise or descent, constitute separate property and are not subject to equitable division. *See* Tenn. Code Ann. § 36-4-121(b)(2)(A)-(D). Under certain circumstances, property generally deemed separate may be found to have been "transmuted" into marital property:

> [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property. One method of causing transmutation is to purchase property with separate funds but to take title in joint tenancy. *This may also be done by placing separate property in the names of both spouses.* The rationale underlying both these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate .... The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Batson v. Batson, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988) (citing 2 H. Clark, *The Law of Domestic Relations in the United States* § 16.2, at 185 (1987) (emphasis added) (brackets in original).

Husband argues that it is unclear from the record as to exactly how the trial court classified the Cold Stream Farm property. Husband further contends that if the trial court classified the farm as separate property, it erred because such a classification would be contrary to the principle of transmutation. Husband notes that the court stated the property was not "legally separate," but that the court then decreed that it was going to treat half of the property as Wife's "equitably separate" property, not subject to further division. Wife, on the other hand, argues that the trial court correctly classified "her" interest in the property as her separate, and "untransmutable," property. The remaining half of the Cold Stream Farm property was also awarded to Wife, thereby granting to her the entire fee simple interest.

While the trial court erred in treating Wife's pre-marriage interest in the Cold Stream Farm property as if it were *still* separate property at the time of the divorce, we conclude that the trial court properly referred to the entire value of the farm as a "joint marital asset." Husband and Wife each intentionally transferred their pre-marriage interest in the property to the other, thereby creating a tenancy by the entirety. This created a rebuttable presumption of a gift to the marital estate. *See* ***Kincaid v. Kincaid***, 912 S.W.2d 140, 142 (Tenn. Ct. App. 1995). Both parties agree that the property was intended to be their marital residence. They resided on the property for the duration of their some 20-year marriage, and they jointly used the property as collateral for loans to purchase other real estate and to make improvements on that real estate. The record is devoid of any evidence indicating Wife's intention to keep her pre-marriage one-half interest, which was acquired as a result of her previous divorce, separate and distinct from the marital estate. We hold that the evidence preponderates against the trial court's tacit conclusion that the evidence rebuts the presumption that Wife made a gift of her one-half interest to the marital estate. The *entire* value of the Cold Stream Farm property is marital property and should have been divided as such.

Husband next contends that, if the trial court properly *classified* Cold Stream Farm as marital property, it erred when it failed to equally divide the value of the property in accordance with the parties' agreement made at mediation. Generally speaking, once classified, separate property is awarded to the party to whom it is separate in nature; while marital property is divided equitably between the parties based upon the pertinent statutory factors found at Tenn. Code Ann. § 36-4-121(c). ***Brock v. Brock***, 941 S.W.2d 896, 900 (Tenn. Ct. App. 1996). Appellate courts are required to defer to a trial court's division of marital property unless the trial court's decision is inconsistent with the statutory factors or is unsupported by the preponderance of the evidence. ***Brown v. Brown***, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

Before rendering its opinion from the bench, the trial court made the following relevant statements:

> I have to divide this property up. Even though [Husband's counsel] has said 50/50, it still has to be an equitable distribution in the Court's view based on values that have to be established, and determination of what's separate properties, the first thing the Court would have to engage in order to do that. Of course, I have given all

> this – I mean, you-all went to mediation, but I don't know that you-all have an agreement on distribution or I wouldn't have been sitting here for the last five hours trying this case. So I'm going to do my job, which is really probably making an equitable distribution, not saying 50/50 is not equitable, but maybe if you-all had a different idea about what an agreement of 50/50 division would be, if you-all had an agreement about that, you should have made an agreement on the exact – who gets what instead of coming here and asking me to decide it and telling me – or being upset if I somehow make an equitable distribution that doesn't fit with what you think 50/50 ought to be.

Husband introduced at trial, without objection, a letter from the parties' mediator, stating that the parties had agreed to divide their marital assets and liabilities equally. Husband testified that the parties agreed that, once the trial court had classified and valued the assets owned by the parties, their net marital estate would be divided on a 50/50 basis. Wife's counsel did not cross-examine Husband on this subject, and, in fact, did not conduct any cross-examination of him. Wife testified at the trial on two occasions – once before Husband testified, and again after he testified. Her testimony is devoid of any reference – pro or con – with respect to whether there was an agreement as testified to by Husband. We also note that, while Husband continues to argue on appeal that there was an agreement, Wife's brief makes absolutely no reference of any kind to the subject. Furthermore, there is no evidence in the record suggesting that either or both of the parties ever repudiated the agreement. Considering all of the above, we conclude that the evidence preponderates that the parties agreed to divide the net marital estate equally. If the parties could not agree on the classification and/or value issues, those tasks would fall to the trial court. Once the court resolved these issues, the parties' agreement as to division would "kick in." Generally speaking, agreements reached in mediation are binding on the parties. *See* ***Myers v. Myers***, No. E2004-01362-COA-R3-CV, 2005 WL 936925, at *3 (Tenn. Ct. App. E.S., filed April 22, 2005), *perm. app. denied*, October 24, 2005. There is no reason in this case not to enforce the parties' agreement.

In view of the parties' agreement and the fact that the evidence preponderates that this case was tried subject to that agreement, we hold that the trial court erred in ignoring that agreement in allocating the net marital estate $589,114 to Wife and only $436,537 to Husband. While in the typical contested divorce case involving the issue of the division of the marital assets and debts, a trial court has wide discretion in dividing the net marital estate, *see* ***Barnhill v. Barnhill***, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991), this case is not typical. Here the parties decided to contest the issue of the *classification* of the Cold Stream Farm property, but agreed that the total net marital estate, as finally determined by the trial court, would be divided equally. Certainly, this is something *sui juris* parties could – and, in this case, did – agree to; it is something that the trial court ignored in its overall division of the net marital estate. This was error.

The trial court classified the parties' assets and obligations, valued the marital property, and determined the amount of the parties' marital debt. On this appeal, neither party challenges the trial

court's findings regarding the value of the various marital assets and the total amount of the marital debt. On remand, the trial court is instructed to re-divide the net marital estate so as to award to each party one-half of the total pursuant to the parties' agreement entered into at mediation.

V.

Husband also argues that the trial court erred in awarding attorney's fees to Wife. We agree. In divorce actions, an award of attorney's fees is considered an award of alimony. *See* ***Ford v. Ford***, 952 S.W.2d 824, 830 (Tenn. Ct. App. 1996). Therefore, a trial court, in considering such an award, must consult the factors set forth in Tenn. Code Ann. § 36-5-121(i)(1)-(12) (2005). *See* ***Storey v. Storey***, 835 S.W.2d 593, 598 (Tenn. Ct. App. 1992) (citing the predecessor to Tenn. Code Ann. § 36-5-121(i)). A trial court may award attorney's fees to a spouse as alimony only if the spouse is disadvantaged and does not have sufficient resources to pay his or her own attorney's fees. ***Barnhill***, 826 S.W.2d at 456; ***Thompson v. Thompson***, 797 S.W.2d 599, 605 (Tenn. Ct. App. 1990). As observed by the Supreme Court,

> [t]he award of attorney's fees "is conditioned upon a lack of resources to prosecute or defend a suit in good faith. . . . If a spouse does not have separate property of her own which is adequate to defray the expenses of the suit, certainly she should not be denied access to the courts because she is unable to procure counsel."

Langschmidt v. Langschmidt, 81 S.W.3d 741, 751 (Tenn. 2002) (citing ***Fox v. Fox***, 657 S.W.2d 747, 749 (Tenn. 1983)). The question of whether to award attorney's fees is within the wide discretion of the trial court, and an appellate court is not to disturb the trial court's award unless there is clear evidence that the trial court has abused its discretion. ***Id.***

Husband contends that the trial court's award of attorney's fees is erroneous because, according to him, Wife has the ability to pay, and, in fact, did pay, her litigation costs, a payment made utilizing funds from one of the parties' joint checking accounts. At trial, Wife testified as follows:

> I had took the first two small accounts because of bills, needing the money to pay the bills with. . . . I took money from Citizens Bank at the time that I knew I was going to get – file for divorce, because I didn't have any money to pay for the divorce.

In view of the fact Wife will receive substantial assets as a result of this modified division of the net marital estate, we conclude that she has the financial resources to pay the fees of her counsel. Regardless of the source of Wife's payments to her attorney and regardless of whether or not she still owes any attorney's fees, we conclude that the evidence preponderates against the trial court's judgment that Husband should pay $5,000 to Wife as an award of fees.

VI.

The judgment of the trial court awarding Wife $5,000 in attorney fees is reversed. The trial court's judgment with respect to the division of the net marital estate is modified and, as such, is affirmed. This case is remanded to the trial court, with instructions, for such further proceedings as may be necessary, consistent with this opinion; for enforcement of the trial court's ultimate judgment; and for the collection of costs assessed below, all pursuant to applicable law. We tax the costs of this appeal to the appellee, Lorita Brackett.

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CHARLES D. SUSANO, JR., JUDGE